

revoked.

STATE OF CONNECTICUT
DEPARTMENT OF HEALTH SERVICES

IN RE: DAMON D. LIZZI
Nursing Home Administrator
License No. 00471

Petition No.
870224-36-010

FINAL DECISION

On April 4, 1988, after a contested case hearing was held, a memorandum of recommended decision was issued in this matter by Gordon T. Allen, Hearing Officer, in accordance with §19-2a-30 of the Regulations of Connecticut State Agencies. Pursuant to Conn. Gen. Stat. §4-179, Damon D. Lizzi (the Respondent) was given the opportunity to file exceptions and present briefs and oral argument in opposition to the recommended decision. Such oral argument was heard by the undersigned on June 16, 1988.

After due consideration, the undersigned has determined to adopt the hearing officer's Memorandum of Recommended Decision, (copy attached) in its entirety, subject to the following modifications:

- 1) In the last line of the first full paragraph on page 6, "3" is hereby substituted for "2".^{1/}


^{1/} I am aware that the Statement of Charges refers to Conn. Gen. Stat. § 19a-517(b)(2) rather than (b)(3). I find,

(footnote continued)

2. In the second line of the first full paragraph on page 8, "3" is hereby substituted for "/or 2".
3. It is specifically found that the respondent engaged in fraud or material deception in the course of professional services or activities in violation of Conn. Gen. Stat. § 19a-517(b)(1) and engaged in illegal conduct in his practice in violation of Conn. Gen. Stat. § 19a-517(b)(3), as alleged in the First Count of the Statement of Charges. It is also found that the respondent's violation of either of these provisions warrants a decision of license revocation on the facts of this case.

Accordingly, it is ordered that the license of Damon Lizzi to practice as a nursing home administrator is hereby revoked, effective forty-five days from the date of this order.

August 17, 1988
Date of Order


Dennis F. Kerrigan
Deputy Commissioner of
Health Services
(Acting pursuant to
Conn. Gen. Stat. § 4-8 in the
absence of the
Commissioner)

(footnote cont'd from previous page)

however, that this is merely a scrivener's error and that the respondent knew or should have known that he was charged with a violation of Conn. Gen. Stat. § 19a-517(b)(3) as well as (b)(1). See State's Motion for Summary Judgment, dated October 21, 1987, page 1.

State of Connecticut
Department of Health Services
Bureau of Health System Regulation
Division of Medical Quality Assurance

Re: Damón D. Lizzi
Nursing Home Administrator
License No. 00471

Petition No.: 870224-36-010

April 4, 1988

MEMORANDUM OF RECOMMENDED DECISION

The undersigned is the designated Hearing Officer charged with conducting the above referenced hearing pursuant to C.G.S. 4-177 et seq, Chapter 54 of the Connecticut General Statutes and Section 19-2a-1 et seq of the Regulations of Connecticut State Agencies.

On August 14, 1987 the Department of Health Services (hereinafter referred to as the "State") filed a Statement of Charges against Mr. Lizzi (hereinafter referred to as the "Respondent") and served same along with a Notice of Hearing setting forth November 5, 1987 as the hearing date.

Prior to the date of the hearing, the State submitted on October 26, 1987 a Motion for Summary Judgment with supporting Brief and documents. At the outset of hearing on November 5, the Respondent, through his attorney, filed with the undersigned a Motion to Dismiss. Subsequent to the hearing, and pursuant to the request of the undersigned, the following additional items were submitted for my consideration and the record:

(1) States Objection to Motion to Dismiss with appendices dated November 17, 1987.

(2) States Supplement of Brief In Support of Motion for Summary Judgment dated November 25, 1987.

(3) Respondents Brief In Support of his Motion to Dismiss and in opposition to States Motion for Summary Judgment dated January 22, 1988.

The following recommended decision is therefore based on the record which includes the above items in addition to the exhibits and/or argument heard at the hearing on November 5, 1987.

The Statement of Charges against the Respondent were set forth in Two Counts, first alleging that the Respondent committed Larceny by Embezzlement while acting in his capacity as a licensed Nursing Home Administrator during the years 1976 to 1978 and the second which alleges that the jury guilty finding thereof is sufficient evidence of his violation of said statute, and thereby violative of C.G.S. 19-a517 (b).

RESPONDENTS MOTION TO DISMISS

As noted above, Respondent submitted a Motion to Dismiss at the outset of the November 5, 1987 hearing. Respondent claims in this motion, inter alia, that the issues were moot as a result of previous licensure action by the State, that the doctrine of laches applied to the current action, and that the statute of limitation was violated along with the concept of the avoidance of multiplicity of actions.

However, in his brief dated January 22, 1988, the Respondent changed his emphasis somewhat and essentially waived his claims regarding a purported statute of limitations, and multiplicity of actions as such. In his brief Respondent argues that the changes should be dismissed for (1) failure to hold a compliance conference required under C.G.S. 4-182(c), (2) the res judicata effect of a previous decision by the State on February 9, 1987, and (3) a claimed failure to "promptly institute" the action.

I find no merit in Respondent's assertions. C.G.S. 4-182(c), in plain language requires only that a licensee given, prior to the initiation of agency action, notice by mail of the facts or conduct which warrant the intended action, and an opportunity to show his compliance. The record is clear that the State provided such written notice on September 22, 1982, and that a conference was held pursuant to such notice with Attorney Christine Spak representing the state. The parties differ in their affidavits as to whether such conference occurred on October 13, 1982 (Respondent) or October 27, 1982 (State), but such discrepancy is immaterial. The salient point is that they both agree on what transpired. It is clear from the three affidavits submitted that one of the subjects of the conference was the Respondent's alleged embezzlement of patients funds, which form the basis of the current charges.

In regard to this issue, the Respondent could not show compliance, as he had recently been convicted after a lengthy jury trial. All that could be offered was the fact that the verdict was being appealed. In view of that the State's representative, Attorney Spak, adjourned the meeting to await the results of the appeal, which was

only appropriate action available. Respondents brief and supporting affidavit establish that the facts underlying the present cause of action were discussed.

The Respondent can cite no authority, nor any language of the statute, which would require another conference to be held, or to support his implicit contention, both in his brief and his oral argument on November 5, that this "compliance conference" amounts to a prehearing "hearing". The State has definitively established that it met the statutory requirements of notice to the Respondent and the providing of an opportunity to show compliance with applicable statutes.

The next argument by Respondent is that his hearing before A. Seale Pinney, commencing in June 1985 and the resulting final decision of the State on February 9, 1987 was res judicata with respect to this matter. In fact, however, the prior decision rested on allegations of improprieties with respect to expense overcharges and Medicaid reimbursement. The instant matter deals with the Respondents embezzlement of patients funds; his conviction of this charge was still under appeal at the time of the aforementioned hearing. It was made clear at the prior hearing that the State was not pursuing this embezzlement matter solely because of the pending appeal, and the Respondents counsel agreed at the time that the State would not be stopped from pursuing this matter at a later date (See Transcript p. 158. In the matter of DAMO D. LIZZI, June 14, 1985 - Appendix 2 to States Objection To Motion to Dismiss).

Respondents final argument, that the present complaint was not "promptly instituted" is equally without merit. First, there is law to the effect that since the statute of limitations is not applicable to disciplinary proceedings, the defense of

laches is also not available (see Stern vs. Connecticut Medical Examining Board, et al CV 84-02945345 Superior Court Hartford, August 5, 1987 - also 61 Am. June 2nd. Physicians & Surgeons, § 104). Even if it did apply, it requires a showing of both inexcusable delay and resulting prejudice. Bianco vs. Darien 157 Conn. 548 (1969). By itself, the mere lapse of time is not sufficient Bozzi vs. Bozzi 177 Conn. 232 (1979).

Respondents appeal of the underlying criminal conviction was not decided until April of 1986, and the final decision in the other administrative action was not made until February 1987. The present statement of charges was instituted on August 14, 1987, and all things considered this does not represent an inordinate delay, even if that were by itself relevant. There is also no prejudice shown or credibly alleged.

For these reasons the Respondents Motion to Dismiss must be and is hereby denied.

STATES MOTION FOR SUMMARY JUDGMENT

As stated preciously, the State filed on October 26, 1987 a Motion for Summary Judgment in favor of its Two Count Statement of Charges. Respondent filed no answer or denial to the States charges, and did not raise any issues or objections in his January 22 brief to this Motion. Respondents reliance at the hearing and subsequently was completely on the issues raised in his Motion to Dismiss.

Based on the record in this case, there is no issue of fact outstanding with respect to the Statement of Charges and the allegations contained therein. That the Respondent committed Larceny by Embezzlement of patient funds as alleged was established by his conviction thereof on July 28, 1982, and by the affirming of that

Judgment by the Supreme Court of Connecticut in State vs Lizzi 199 Conn. 462 (1986)

There can be, and is no dispute with regard to this essential fact.

Therefore, the States Motion for Summary Judgment is hereby granted. It is as consequence my finding that the Respondent committed Larceny by Embezzlement of patient funds during the period of 1976 to 1978 while serving as the licensed Nursing Home Administrator for Ferry Point Skilled Nursing Facility of Old Saybrook. It is further finding that such conduct is a failure to conform to the accepted standards nursing administrators and is violative of Sections 1 and 2 of C.G.S. 19a - 517(b)

The remaining issue to be resolved is the degree of disciplinary action that appropriate under the circumstances. The State, in its Supplemental Brief on November 25th, argues that the Respondents conduct was not only criminal in nature but especially grievous in view of the fiduciary trust placed in him by virtue of his position as a Nursing Home Administrator. The State also quoted extensively from Supreme Court record in State vs. Lizzi 199 Conn. 465-467. From that record the Respondents fraudulent intent in drawing against the patients personal funds accounts is clear as no fewer than four witnesses attested to false and irregular charges posted to patient accounts, including the Respondents former wife who testified that Respondent knew what he was doing was wrong.

According to the briefing schedule established on November 5, 1987, the Respondent was to have filed a brief in opposition to the States Motion for Summary Judgment by December 11, 1987. It was specifically requested that Respondent deal with the prospective penalty issue in that brief. On or around the third week in

December Respondents attorney requested further time to prepare his brief, which was granted by the undersigned for "a reasonable time." On January 7, 1988, the State counsel requested that I decide the matter on the basis of the record to-date, as a result of which on January 15th I notified Respondents counsel of my intention to decide by January 22nd in the event of my failing to receive his brief. On January 15th Respondents counsel advised me that he had been unable to prepare his brief for reasons relating to a recent office relocation.

Having still received nothing from Respondent by March 8th, the undersigned wrote counsel on that date giving him until March 22nd to file said brief. On March 21, Respondents counsel wrote the undersigned again to the effect that the press of business had prevented him again from doing the brief and he sought yet another continuance for "a couple of weeks". The undersigned contacted the states counsel, Mr. Varga, who had not received a copy of the above March 21, 1988 letter, and was advised that the State strongly objected to any further delay. I concur with the States position.

The point in discussing the sequence above at length is to establish for the record the fact that the undersigned has gone the extra mile in trying to accommodate the Respondent. However, the time must eventually come when decisions are required and deadlines adhered to. That time has arrived in this case.

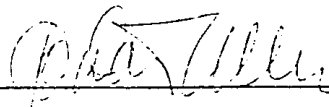
Therefore, the undersigned is not aware of any factors, which would mitigate in favor of the Respondent. The record shows that he committed embezzlement of patient funds under his supervision as a licensed Nursing Home Administrator, a serious breach

of a fiduciary obligation that justifies the severest of sanctions on its own merit and as well for the deterrent value that such a precedent may establish.

RECOMMENDED DECISION

It is therefore concluded that the Respondent's conduct in committing Larceny Embezzlement of patient finds violated C.G.S. 19a-517(b) Sections 1 and/or 2. and as a consequence it is recommended that the Commissioner of Health Services revoke license of the Respondent Damon D. Lizzi to practice as a Nursing Home Administrator.

Respectfully Submitted


Gordon T. Allen
Hearing Officer

Dated at Rocky Hill this 4 day of April, 1988.